REL: February 28, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180953

C.P.P.

v.

L.J.B.

Appeal from Elmore Juvenile Court
(JU-19-45.01)

PER CURIAM.

C.P.P. ("the father") and L.J.B. ("the mother") are the divorced parents of C.M.P. ("the child"), who was born in September 2004. The parties' 2005 divorce agreement, which was incorporated into a divorce judgment, provided that the mother would have sole physical custody of the child, that the father would have certain supervised visitation, and that the

father would pay child support in the amount of $190.32 per month. The father's parents, L.P. ("the paternal grandfather") and D.P. ("the paternal grandmother"), supervised the father's visitation.

In February 2019, the mother, acting pro se, filed in the Elmore Juvenile Court ("the juvenile court") a petition seeking to terminate the father's parental rights. The juvenile court appointed the mother an attorney, and the mother amended her petition on April 9, 2019. In that amended petition, the mother alleged that the father had not visited or had contact with the child since August 2018, that the father had failed to pay child support, that the father had been convicted of and imprisoned for a felony, that the father abused drugs, and that the father had not adjusted his circumstances to meet the needs of the child. The juvenile court appointed counsel for the father, who was incarcerated. The father answered the petition and moved for permission to provide deposition testimony in lieu of his attendance at trial, which motion the juvenile court granted. See Rule 32(a)(3)(C), Ala. R. Civ. P.; Belser v. Belser, 575 So. 2d 1139, 1140 (Ala. Civ. App. 1991).

The paternal grandfather and the paternal grandmother moved to intervene in the termination-of-parental-rights action. After their motion to intervene was granted, they filed a complaint in intervention seeking visitation rights under Ala. Code 1975, § 30-3-4.2. After a trial on July 11, 2019, the juvenile court entertained trial briefs from all parties. On August 6, 2019, the juvenile court entered a judgment terminating the father's parental rights and awarding the paternal grandfather and the paternal grandmother specified visitation with the child. On August 12, 2019, the father filed a notice of appeal. In response to the father's notice of appeal, the juvenile court issued an order indicating that the record was not adequate for appeal to this court. The mother filed a motion challenging the juvenile court's conclusion that the record was inadequate, and the juvenile court subsequently issued an order declaring the record to be adequate to support an appeal to this court. The paternal grandfather and the paternal grandmother filed a postjudgment motion directed to the August 6, 2019, judgment on August 19, 2019; the father filed a postjudgment motion and a second notice of appeal to this court on August 20, 2019.

The juvenile court denied both postjudgment motions, resulting in the quickening of the father's notice of appeal.[1] See Rule 4(a)(5), Ala. R. App. P.

On appeal, the father argues that the record does not contain clear and convincing evidence that termination of his parental rights is warranted or that no viable alternative to the termination of his parental rights exists. In response, the mother contends that the juvenile court had ample evidence, particularly of the father's lack of consistent contact with the child and of his incarceration, to establish grounds for the termination of the father's parental rights. After a review of the father's argument and the evidence contained in the record on appeal, we reject the father's arguments in support of reversal.

The record reveals the following facts pertinent to our resolution of this appeal. As noted above, the father did not attend the trial, but his deposition testimony was admitted into evidence. He testified in that deposition that he and

[1]Because the father had already filed a notice of appeal, the August 20, 2019, notice of appeal was superfluous. His August 12, 2019, notice of appeal was held in abeyance pending the resolution of the postjudgment motions. See Rule 4(a)(5), Ala. R. App. P.

the mother had been married in 2002, had divorced in 2005, and, that, upon their divorce, had agreed that the mother would have custody of the child. The father said that he had exercised his alternating weekend visitation with the child regularly in the first few years after the divorce and that the paternal grandfather and the paternal grandmother had supervised his visits with the child. He complained that, although he was entitled to certain holiday visitation, he was not always permitted by the mother to exercise that visitation. He explained that his several incarcerations had impeded his ability to visit with the child, that the paternal grandfather and the paternal grandmother had exercised visitation in his stead, but that the frequency of their visits had reduced over time.

According to the father, his first incarceration after the divorce occurred in 2007 after he was convicted for breaking and entering a vehicle and theft of property. He explained that he was sentenced to 15 years for those offenses but that the sentence had been a "15 split 3," which required him to serve only 3 years of the 15-year sentence. Thus, the father said, he had been incarcerated between some point in

2007 and October 2010. The father testified that, in October 2010, he had sought employment so that he could pay child support and repay the paternal grandmother, who, he explained, had paid child support on his behalf while he was incarcerated.

The father said that he had been living in a halfway house after his release from prison in October 2010. During the period that he lived in the halfway house, the father said, the child had visited him there on two occasions with the paternal grandfather and the paternal grandmother. He explained that, despite assistance at the halfway house and participation in Narcotics Anonymous, he had relapsed into drug use and had returned to prison in June 2011 as a result of his having violated the conditions of his split sentence.

The father testified that he was incarcerated for the second time between June 2011 and June 2014. The paternal grandmother transported the child to visit the father on two separate occasions when the father was in a work-release facility in 2012 or 2013. He said that, after his release from prison in June 2014, he went to live with his brother. According to the father, he remained drug-free for about five

months following his release in 2014, but he again relapsed. He testified that the first time he had used drugs again following his release from prison in 2014 he had "blacked out and woke up with" a second set of breaking-and-entering-a-vehicle and theft-of-property charges because, he said, he reportedly had broken into a vehicle while under the influence of drugs. The father was apparently convicted of the charges resulting from that incident.

According to the father, he was first held in the Montgomery County Jail, but he was subsequently moved to the Bullock Correctional Facility in 2015, where he remained until he was released on March 5, 2018. The father testified that he had remained out of prison between March 2018 and May 2018, when he "caught a public intox[ication charge]." The father said that he was incarcerated "here"[2] between May or June 2018 and August 2018. After his release from incarceration on the public-intoxication charge, the father said, he returned to the paternal grandmother and the paternal grandfather's home

[2]We are unclear regarding whether the father's use of the word "here" referred to the specific correctional facility at which he was incarcerated, i.e., Kilby Correctional Facility, where he was incarcerated at the time of his deposition, or to the locality of incarceration, i.e., Montgomery County.

to live and entered a program that required him to report daily, which apparently meant that he would report to a particular place and remain there between 8:00 a.m. and 3:00 p.m., during which time he would attend GED classes and perform community service. He said that his attendance at that program had prevented him from finding a job at that time.

The father testified that he was incarcerated in a prison for the fourth time in October 2018. He explained that he had been charged with possession of "dope" because, he said, he had been riding in an automobile with some friends who had had drugs in their possession. Although the father denied having used drugs on that occasion, he explained that the "owner" of the "dope" would not confess to his ownership, so all occupants of the automobile had been charged. As a result, the father testified, his probation was revoked and he was returned to prison, where he remained at the time of trial. The father said that he had not been convicted of the possession charge. He further testified that he would reach "EOS" or "end of sentence," i.e., serve the entirety of the remainder of his sentence (presumably on his second set of

breaking-and-entering-a-vehicle and theft charges) and be released from incarceration in three or four months (or approximately in August 2019), after which, he said, he would be on probation for three years.

The father admitted that he had not been employed regularly because of his repeated incarcerations. However, he explained that the paternal grandmother had paid his child support each month. In fact, the father testified that the paternal grandmother had, at some point and at his request, voluntarily increased the amount she paid to the mother to $350 per month to assist the mother with the expense of the child's private-school tuition.[3] He said that the paternal grandmother was keeping up with the amount she had paid on his behalf and that he intended to pay her back upon his finding employment after his release from incarceration. He testified that he had become certified as a plumber's helper during his current incarceration and that he intended to pursue a career in the plumbing field. He also testified that he had taken a

[3]The child was no longer attending the private school at the time of trial. The amount of the more recent checks written by the paternal grandmother was not revealed in the record.

parenting course and had attended "SAP," a substance-abuse program, while incarcerated.

The father testified that he had last visited with the child in September 2018 when he and the child had attended a family gathering at a Lake Martin residence with the paternal grandfather and the paternal grandmother. However, he complained that the mother had refused his request to visit the child on the child's birthday. He also remarked that the mother had informed him that she did not want the child to visit the father at a correctional facility. He said that he had spoken with the child by telephone periodically when the child was visiting the paternal grandfather and the paternal grandmother and that he had, in fact, spoken with the child over the telephone the Friday before his May 8, 2019, deposition and three other times in the previous month. According to the father, the child had told him during those conversations that he loved him and that he missed him. The father also said that he had not recently written any letters to the child, but he also said that the mother had not given him her address when she moved to Elmore County.

The father admitted that he has a drug problem and that his drugs of choice are methamphetamine and Xanax. He denied having used drugs in front of the child or having exposed the child to "those things." When asked how he intended to make sure that he would be able to remain drug-free and free from incarceration, the father explained that he planned to attend church and to stay away from those former friends who continued to use drugs. He said that he would initially live with the paternal grandmother and the paternal grandfather and that he planned to continue learning the plumbing trade.

The paternal grandmother testified that she and the paternal grandfather had supervised the father's visitations with the child. She recalled having had visits with the child every other weekend in the initial years following the parents' divorce. However, she testified that things had begun to change in 2011. She admitted that the father had probably had only three visits with the child in the three years preceding the trial. According to the paternal grandmother, the father would speak with the child by telephone when the child visited with her and the paternal grandfather. The paternal grandmother also testified that she

had paid child support on the father's behalf and that the father intended to repay her. She also testified that, at the father's request, she had increased the amount of child support she was paying to the mother three different times since the parties' divorce.

The mother testified that the father had not taken advantage of the visits to which he was entitled under the divorce judgment and that the father had seen the child only twice since 2014. She said that, when he had not been incarcerated, the father had not contacted her to arrange visitation. However, she admitted that the father had communicated with the child via text message periodically, or "once every couple of weeks," during the preceding three years when he was not incarcerated.

The mother said that the child would not be safe if in the father's presence because, she said, she did not believe that the father would attend drug rehabilitation. The mother testified, without elaboration, that the father had used drugs around the child. She described the father as a bad influence on the child because he was a drug addict and a "career criminal." She testified that the child had been hurt when

the father had lied about "straightening up" his life upon his release from his third incarceration.

The mother admitted that the paternal grandmother had given her checks with "child support" written in the memo line. However, the mother testified that she was not "accepting that as child support from [the father], because he does not pay me the child support." Thus, the mother testified that the father had not paid child support for 14 years.

According to the mother, the child has a good relationship with the paternal grandmother and the paternal grandfather. She testified that she trusts them and that she had trusted the father when he was around them. However, she said that she did not trust that the father would seek rehabilitation or that he would "stay sober long enough."

The child, who was 14 years old at the time of the trial, testified in camera. He testified that he would soon be in the ninth grade in school and that he had played on the school's basketball team for the previous two years. The child indicated that he had no real relationship with his father and that he thought termination of the father's

parental rights would be appropriate. The child recalled having visited with the father in September 2018 and said that he had spoken to the father on the telephone on some occasions when he had been visiting with the paternal grandfather and the paternal grandmother. He commented that he believed that the father had his telephone number. The child also recalled that his father had written to him regularly before he and the mother had moved to Elmore County approximately three years before the trial.

The termination of parental rights is governed by Ala. Code 1975, § 12-15-319. That statute reads, in part:

> "(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her] responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parent[]. In determining whether or not the parent[] [is] unable or unwilling to discharge [his or her] responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:
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> > "(1) That the parent[] ha[s] abandoned the child, provided that in these cases, proof shall not be required of reasonable

efforts to prevent removal or reunite the child with the parent[].

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for the needs of the child.

"....

"(4) Conviction of and imprisonment for a felony.

"....

"(9) Failure by the parent[] to provide for the material needs of the child or to pay a reasonable portion of support of the child, where the parent is able to do so.

"(10) Failure by the parent[] to maintain regular visits with the child in accordance with a plan devised by the Department of Human Resources, or any public or licensed private child care agency, and agreed to by the parent.

"(11) Failure by the parent[] to maintain consistent contact or communication with the child.

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review.

> "....
>
> "(c) A rebuttable presumption that the parent[] [is] unable or unwilling to act as parent[] exists in any case where the parent[] ha[s] abandoned a child and this abandonment continues for a period of four months next preceding the filing of the petition. Nothing in this subsection is intended to prevent the filing of a petition in an abandonment case prior to the end of the four-month period."

A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. P.S. v. Jefferson Cty. Dep't of Human Res., 143 So. 3d 792, 795 (Ala. Civ. App. 2013). "Clear and convincing evidence" is "'[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.'" L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting Ala. Code 1975, § 6-11-20(b)(4)). Although a juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct, K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d 602, 605 (Ala. Civ. App. 2010), "[t]his court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by

evidence that the juvenile court could have found to be clear and convincing." K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016). That is, this court

> "'must ... look through ["the prism of the substantive evidentiary burden," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986),] to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would "produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion."'"

K.S.B., 219 So. 3d at 653 (quoting Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008), quoting in turn Ala. Code 1975, § 25-5-81(c) (defining "clear and convincing evidence" for purposes of the Alabama Workers' Compensation Act)).

In cases like this one, in which one parent seeks to terminate the parental rights of the other parent, the following test is applicable:

> "The two-prong test that a court must apply in a parental rights termination case brought by a custodial parent consists of the following: First, the court must find that there are grounds for the termination of parental rights, including, but not limited to, those specifically set forth in [Ala. Code 1975,] § 26-18-7 [now codified at § 12-15-319]. Second, after the court has found that there exist grounds to order the termination of parental rights, the court must inquire as to whether all viable

> alternatives to a termination of parental rights have been considered."

Ex parte Beasley, 564 So. 2d 950, 954-55 (Ala. 1990).

The father first argues that the evidence presented to the juvenile court does not support the juvenile court's findings that he abandoned the child, that he failed to visit with the child, that he failed to maintain consistent contact with the child, that he failed to provide for the material needs of the child, and that he had not adjusted his circumstances to meet the needs of the child. He contends that he contacted and visited with the child, albeit sporadically, mostly as a result of his repeated incarcerations, and that he had provided material support for the child by having the paternal grandmother pay his child support to the mother.

We agree with the father that the evidence presented to the juvenile court does not support the conclusion that the father did not provide material support for the child. Initially, we note that the father was incarcerated for a substantial period, and, therefore, he likely lacked the ability to pay child support because he earned no income. The father's ability to pay child support during the periods he

was not incarcerated was not proven. See § 12-15-319(a)(9) (stating that the failure to provide for the material needs of the child or to pay child support, "where the parent is able to do so," is one factor for the juvenile court's consideration when considering the termination of parental rights). Although the mother testified that she did not consider the checks she received from the paternal grandmother as payments satisfying the father's child-support obligation, the testimony clearly indicated that the paternal grandmother had forwarded the mother those checks, which were for at least the amount of the father's $190 child-support obligation and as much as $350 per month, on the father's behalf to satisfy the father's child-support obligation and to provide support for the child and to defray some of his expenses. See generally Binns v. Maddox, 57 Ala. App. 230, 232, 327 So. 2d 726, 728 (Civ. App. 1976) ("If the sum directed to be paid by the father is paid by the government through social security benefits derived from the account of the father, the purpose of the order has been accomplished."); see also Lightel v. Myers, 791 So. 2d 955, 960 (Ala. Civ. App. 2000) ("In Alabama, a parent's child-support obligation may be offset by payments by a third-party source where those payments constitute a

substitute income source."). The mother accepted the money from the paternal grandmother.

However, the finding relating to the father's failure to provide maintenance or support for the child is not the only basis for the juvenile court's conclusion that the father abandoned the child. The juvenile court based its conclusion on the totality of the father's conduct, which included the father's failure to maintain contact with or visit the child. See A.E. v. M.C., 100 So. 3d 587, 598 (Ala. Civ. App. 2012) ("Although 'maintenance,' i.e., support, is one of many factors to consider in determining whether a parent has abandoned a child, it is clear that failing to be present and act as a parent is equally significant."). "Abandonment" is defined in Ala. Code 1975, § 12-15-301(1), as

> "[a] voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, without good cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or failure to perform the duties of a parent."

The record clearly reflects that the father did not visit with the child during his periods of incarceration. "Although involuntary imprisonment alone does not equate to abandonment,

a juvenile court can consider the voluntary conduct of the parent toward the child before and after incarceration as evidencing abandonment of the child." C.F. v. State Dep't of Human Res., 218 So. 3d 1246, 1250 (Ala. Civ. App. 2016). The juvenile court also found that the father had not attempted to visit or communicate with the child more frequently despite having had the opportunity (and the right) to do so between his periods of incarceration. Evidence presented to the juvenile court, which reflects that the father visited the child two or three times between 2014 and 2018, supports this conclusion. The father's contact with the child by telephone was also sporadic and, it appears, depended on the child's visiting with the paternal grandfather and the paternal grandmother, despite the fact that the child testified that he believed that the father had his telephone number and the fact that the mother indicated that the father had communicated with the child by text message on a few occasions in early 2018. Based on that evidence, the juvenile court concluded that the father's lack of effort to maintain contact with the child indicated a lack of effort to maintain a relationship with the child and resulted in abandonment. We conclude that

the evidence presented to the juvenile court clearly and convincingly supports the juvenile court's determination.

Because the evidence supports the conclusion that the father abandoned the child, we need not consider whether the juvenile court had sufficient evidence to support its conclusion that no viable alternative to the termination of the father's parental rights existed. "[B]y abandoning the child[], the father 'lost any due-process rights that would have required the juvenile court to explore other alternatives before terminating [his] parental rights.'" W.R. v. Houston Cty. Dep't of Human Res., 201 So. 3d 556, 558 (Ala. Civ. App. 2015) (quoting C.C. v. L.J., 176 So. 3d 208, 216 (Ala. Civ. App. 2015)); see also C.F. v. State Dep't of Human Res., 218 So. 3d at 1251. We therefore reject the father's viable-alternative argument.

Having considered and rejected the father's arguments in support of reversal, we affirm the juvenile court's judgment terminating the parental rights of the father.

AFFIRMED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Donaldson, J., concurs in part and concurs in the result, with writing.

Edwards, J., dissents, with writing.

DONALDSON, Judge, concurring in part and concurring in the result.

I concur in all aspects of the main opinion except that part discussing the finding of the juvenile court that the father "failed to provide for the material needs of the child or to pay a reasonable portion for support of the child" and the application of Ala. Code 1975, § 12-15-319(a)(9). As to that part, I concur in the result.

EDWARDS, Judge, dissenting.

I respectfully dissent. I recognize that the evidence presented to the Elmore Juvenile Court ("the juvenile court") would support a conclusion that C.P.P. ("the father") abandoned C.M.P. ("the child") by failing to regularly visit the child or to maintain consistent communication with him. See A.E. v. M.C., 100 So. 3d 587, 598 (Ala. Civ. App. 2012). I am also aware that, upon the finding of abandonment, the juvenile court was not required to consider viable alternatives to the termination of the father's parental rights. See W.R. v. Houston Cty. Dep't of Human Res., 201 So. 3d 556, 558 (Ala. Civ. App. 2015). However, I cannot agree that circumstances like those in the present case, which involve the termination of the parental rights of a noncustodial parent upon petition of the custodial parent, amount to such an egregious situation that termination of the father's parental rights is warranted.

At the heart of the juvenile court's power to terminate parental rights is the protection of the best interest and welfare of a child. Our supreme court explained it this way: "Our courts are entrusted with the responsibility of

determining the best interest of children who come before them. When a child's welfare is threatened by continuation of parental rights, the law provides a means for terminating those rights." Ex parte Brooks, 513 So. 2d 614, 617 (Ala. 1987), overruled on other grounds by Ex parte Beasley, 564 So. 2d 950 (Ala. 1990). In my opinion, a decision to terminate parental rights in situations in which the well being of the child is not threatened runs counter to the fundamental principle stated by our supreme court: "Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances." Ex parte Beasley, 564 So. 2d at 952. In addition, our supreme court and this court have reiterated that the termination of parental rights of one parent on the petition of the other parent should not be based merely on the convenience of the parties. See Ex parte Brooks, 513 So. 2d at 617; S.D.P. v. U.R.S., 18 So. 3d 936, 939 (Ala. Civ. App. 2009). As this court has explained, "termination of the parental rights of a noncustodial parent is not appropriate in cases in which the child[] can safely reside with the custodial parent and the continuation of the

noncustodial parent's relationship does not present any harm to the child[]." J.C.D. v. Lauderdale Cty. Dep't of Human Res., 180 So. 3d 900, 901 (Ala. Civ. App. 2015). Thus, because the facts in this particular case mirror those in In re Beasley, 564 So. 2d 959, 960 (Ala. Civ. App. 1990), in which the father had only sporadically visited with his son but had not physically harmed the son or interfered with the custodial rights of the son's mother, I would conclude in the present case that the "termination of the father's parental rights in this case [is] ... an unnecessarily drastic action not supported by clear and convincing evidence."